



**Frigoken Limited v Musotsi (Civil Appeal 89 of 2024)
[2024] KEHC 10642 (KLR) (12 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10642 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 89 OF 2024
DKN MAGARE, J
SEPTEMBER 12, 2024**

BETWEEN

FRIGOKEN LIMITED APPELLANT

AND

MARGDALINE KHAMITWA MUSOTSI RESPONDENT

RULING

1. The applicant filed this appeal from a decision of the lower court in Murang'a ELRC No. 7 of 2020 given on 19/8/2020.
2. The same was accompanied with an application for stay pending Appeal. However, noting that the matter needed to be saved from its own ignominy I decided to make this ruling so as to allow the Appellant rectify a fatal error in the matter.
3. The claim relates to employment. There is nothing we can call a predominant question. It is a purely employment matter. the constitution forbids this court from dealing with labour issues. In Article 165(5) of the constitution, the constitution provides as follows: -
 5. The High Court shall not have jurisdiction in respect of matters-
 - a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;
or
 - b. falling within the jurisdiction of the courts contemplated in Article 162 (2).”
4. In this case, the matter falls within the purview of the courts contemplated under Article 162(2) of the constitution, which posits as doth; -
 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-



- a. employment and labour relations; and
- b. the environment and the use and occupation of, and title to, land.”

5. This court cannot usurp powers of those courts. An appeal of this nature is a nullity and orders issued in furtherance of that appeal are equally a nullity. In *Macfoy v. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172(1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

6. Jurisdiction is everything. There is no appeal or application before me. It is a nullity ab initio. There is even nothing to transfer. In *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what

I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

7. This court can only deal with an employment matter when it is incidental to the main case. It is what is known as a predominant test. In *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, the High Court stated as doth: -

“105. Subsequent to the above decisions, our Courts have identified the correct approach to determine the appropriate superior Court to hear such hybrid cases. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in the controversy is. For example in *Suzanne Butler & 4 Others v Redhill Investments & Another* the Court stated the test in the following words:

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at



the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

8. In the case of *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR, Justice Joel Ngugi as he then was stated as follows: -

17. At the same time, however, it is imperative that a Court should not approach jurisdiction in an ultra-technocratic fashion as an essentialist parsing of sticks in a bundle. Jurisdiction is a substantive standard aimed at ensuring only the right court or tribunal clothed with the legitimate mandate deals with a dispute or controversy. It is not a jurisprudential thaumatrope to keep litigants guessing to which Court their controversy belongs at the pain of having their timeously pleaded case struck out for not pigeon-holing their claim in the correct box. The correct approach to jurisdiction is one which treats the question functionally as opposed to technically; one that looks at the constitutional objectives in creating equal status Courts as opposed to engaging in an essentialist, taxonomical and categorical analysis.

18. Happily, this is the approach taken by our Courts to the question. In this regard, I can do no better than quote Justice Abuodha of the Employment and Labour Relations Court, who, faced with a "mixed grill case" delivered this jurisprudential gem:

The objection rekindles the debate on what a Court should do in mixed grill cases. Would an employee who during the tenure of his employment borrowed money or took a mortgage predicated on the employment relationship upon contesting termination of his services split his claim among the various Court? This Court in the case of *Peter Mutisya Musembi & another v. National Bank of Kenya* (2014) eKLR borrowing from the Australian cases of *Dean Patty v. Commonwealth Bank of Australia* 2000 FCA 1072 and *Philip Morris Inc. v. Adam P. Brown Male Fashions Ltd* (1981) 148 CLR became of the view that the argument that this Court and indeed other Courts of concurrent jurisdiction properly seized of a matter cannot adjudicate upon consequential or factual question which on the face of it appear to be within the exclusive jurisdiction of another Court in the same judicial tier would unreasonably emasculate and whittle down the inherent power of a Court of law to do justice without undue regard to technicalities."

9. The Supreme Court of Kenya in Application No.2 of 2011}} involving *Samuel Kamau Macharia v. KCB and Others* [2012] eKLR as follows:

"A Court's jurisdiction flows from either the constitution or Legislation or both. Thus a Court can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

...the Court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation."



10. There is no basis of having a labour case in this court. Consequently, the entire Appeal together with the Application dated 6/9/2024 is struck out. The file is closed.

Determination

- a. The appeal is filed in a court without jurisdiction and is consequently struck out.
- b. The file is closed.

DELIVERED, DATED AND SIGNED VIRTUALLY ON THIS 12TH DAY OF SEPTEMBER, 2024.

Ruling delivered through the CTS, *ex tempore*

KIZITO MAGARE

JUDGE

Represented By: -

Ricar Advocates LLP for the Appellant/Applicant

Kirubi Mwangi Ben & Co. Advocates for the Respondent/Respondent

